No. 43218-8-II

IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

CHADWICK LEONARD KALEBAUGH,
Appellant.

APPELLANT'S BRIEF

Carol A. Elewski, WSBA # 33647
Attorney for Appellant
P.O. Box 4459
Tumwater, WA 98501
(360) 570-8339

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Court Rules

I. INTRODUCTION/SUMMARY OF THE ARGUMENT

The defendant-appellant in this case, Chadwick Kalebaugh, served his country through active wartime duty in the United States Navy for four years. 2VRP 123. Convicted in the instant case of Child Molestation in the First Degree, Mr. Kalebaugh's prior record is free of any implications of a prurient interest in children. 3VRP 70-71 (only prior conviction was a violation of the Controlled Substances Act). On appeal, Mr. Kalebaugh argues his conviction should be reversed for the following reasons:

First, the trial court violated Mr. Kalebaugh's due process rights in erroneously informing the jury that it had to convict unless it had an articulable reason to acquit, and could acquit only with such reason. The trial court stated in its preliminary jury instructions: "If after your deliberations you do not have a doubt for which a reason can be given as to the defendant's guilt, then, you are satisfied beyond a reasonable doubt. On the other hand, if after your deliberations you do have a doubt for which a reason can be given as to the defendant's guilt, then, you are not satisfied beyond a reasonable doubt." 1VRP 9. This instruction both shifted the burden of proof and undermined the presumption of innocence, requiring reversal.

Next, the State failed to prove the "sexual contact" element of the crime when it failed to establish 1) the "touching of the sexual or other intimate parts of a person" that was 2) "done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). It failed to prove these requirements when its only evidence of wrongdoing was the testimony of a witness who briefly saw movement under a blanket somewhere in the area between a child's knees and belly button.

Third, the trial court's jury instruction defining "sexual contact" was erroneous and misleading when it allowed the jury to determine that *any* body part could be an intimate body part and informed the jury the determination was based on the part touched, not on the purpose of the touching, in contradiction to case law. This erroneous instruction prejudiced Mr. Kalebaugh when it allowed conviction under a less rigorous standard than required by law. Moreover, the erroneous instruction was particularly prejudicial because it dovetailed with the prosecutor's improper argument that anywhere between the knees and the waist is an intimate body part.

Further, the prosecutor's explanation of what is an intimate body part was incorrect and prejudicial when it told the jury anywhere between the knees and the

waist is an intimate body part, when an intimate body part is one in close proximity to the genitalia or breasts and is determined by the purpose of the touch.

Finally, even if any one of these errors alone does not require reversal, taken together, they cumulatively denied Mr. Kalebaugh his right to a fair trial and require reversal.

ASSIGNMENT OF ERROR

A. Assignment of Error

1. The trial court erred in instructing the jury, during its preliminary instructions, that: "If after your deliberations you do not have a doubt for which a reason can be given as to the defendant's guilt, then, you are satisfied beyond a reasonable doubt. On the other hand, if after your deliberations you do have a doubt for which a reason can be given as to the defendant's guilt, then, you are not satisfied beyond a reasonable doubt."

2. The trial court erred in allowing the issue of Mr. Kalebaugh's guilt to go to the jury when the evidence was insufficient to convict as a matter of law.

3. The trial court erred in adding, over Mr. Kalebaugh's objection, the following sentence to the standard jury instruction defining "sexual contact": "Contact is intimate, if the contact is of such a nature that a person of common

intelligence could fairly be expected to know that under the circumstances the parts touched were intimate and therefore the touching was improper."

4. The trial court erred in overruling the defense objection to the prosecutor's argument that, "Now you as a jury get to decide what counts as an intimate part of the person's body."

5. The trial court erred in overruling the defense objection to the prosecutor's argument that, "even if [the touching] was closer to the knees or closer to the belly button, rubbing on her, that's an intimate area. Anywhere in that zone [between the knees and the belly button] is intimate. You wouldn't feel comfortable with a stranger touching you anywhere near, probably nowhere on your body, but especially nowhere between that zone. That's an intimate part of your body."

B. Issues Pertaining to Assignment of Error

1. Were Mr. Kalebaugh's due process rights violated when the trial court instructed the jury it had to convict unless it could articulate a reason to acquit, an instruction which shifted the burden of proof and undermined the presumption of innocence?

2. Did the State fail to prove the charged crime when the only evidence of wrongdoing was given by a witness who saw movement under a

blanket somewhere in the area between the alleged victim's knees and belly button and, thus, the State failed to prove the touching of an intimate or sexual body part done for the purpose of sexual gratification?

3. Did the trial court incorrectly define sexual contact when it added a sentence to the pattern jury instruction which, although it was based in case law, taken out of context allowed the jury to find *any* body part to be an intimate body part and to base its determination on the place touched, not the defendant's conduct or the purpose of the touching?

4. When the State told the jury that any place between a person's knees and waist is an intimate body part, did it misstate the law and prejudice Mr. Kalebaugh when only parts in close proximity to the genitalia or breasts are intimate body parts and nonsexual body parts are deemed intimate based on the purpose of the touching?

5. If none of the errors requires reversal on its own, is reversal nevertheless required for cumulative error?

III. STATEMENT OF THE CASE

A. Procedural History

By information filed October 31, 2011, the State charged Mr. Kalebaugh with Child Molestation in the First Degree, allegedly committed on or about

October 28 to 29, 2011, against H.R.S. and in violation of RCW 9A.44.083. Clerk's Papers (CP) 1-3. The State filed an amended information December 16, 2011, adding two aggravating factors: vulnerable victim and abuse of a position of trust. CP 4-6, 7.

Prior to trial, the court ruled the child victim was not competent to testify at trial and none of her out-of-court statements was admissible at trial. CP 15-17. It also held admissible Mr. Kalebaugh's statements to the police. CP 17.

Mr. Kalebaugh was convicted after a three-day jury trial, the Honorable Richard L. Brosey presiding. CP 34; Verbatim Reports of Proceedings for January 3, 2012 (1VRP), January 4, 2012, (2VRP), and January 5, 2012 (3VRP). The jury found the vulnerable victim aggravating factor had been proven, but the abuse of a position of trust had not. CP 35, 36.

Mr. Kalebaugh moved for a new trial on the grounds of improper prosecutorial argument. CP 37-40. The court denied the motion, CP 55-56, after conducting a hearing on the matter. 3VRP 54-69.

At sentencing held on March 16, 2012, 3VRP 70-82, it was determined that Mr. Kalebaugh had an offender score of 1, with a sentencing range of 57 to 75 months to life in prison under RCW 9.94A.507. CP 66. The court imposed

sentence of 72 months to life in prison and community custody for life, plus costs and fees. CP 67-68.

Notice of appeal was timely filed the day of sentencing. CP 80-94.

B. Substantive Facts

1. Evidence of the Offense.

In October 2011, Kristal Strong; her three children; her current romantic partner, William Sheldon Joyce (frequently referred to at trial as Sheldon); and several friends, including Mr. Kalebaugh and Brianna Suasey shared a house in Napavine. 1VRP 21-23, 47. Mr. Kalebaugh and Joyce had known each other most of Joyce's life. 1VRP 51. Suasey's romantic partner, Randy Grantham, frequently spent the night and was there the night of the incident. 1VRP 43. Tiffany Schultz was temporarily staying at the house with her two boys and five-year-old daughter, the alleged victim in this case, H.R.S. 1VRP 23 & 82.

Following a birthday party for Strong's five-year-old son, Strong put her two boys to bed upstairs. 1VRP 25. H.R.S. went to sleep downstairs on the love seat in the living room, covered with a blanket. 2VRP 20, 1VRP 26; *but see* 1VRP 24 (Strong said H.R.S. went to sleep on the couch). Schultz also made beds for her two boys in the living room; one on a reclining chair, the other on the couch. 2VRP 20, 1VRP 52; *but see* 1VRP 25 (Strong stated all the boys slept upstairs).

Schultz had made a bed of blankets on the floor next to the love seat where she planned to sleep that night. 1VRP 37. Mr. Kalebaugh generally slept on the couch in the living room or, if Schultz was there, on a bed in the garage. 1VRP 41, 51.

Strong, Schultz, Joyce and Mr. Kalebaugh went out to the garage to play a drinking game, beer pong. 1VRP 24-25. Joyce and Mr. Kalebaugh split an 18-pack of beer; Schultz "had a few" drinks, 1VRP 25, or drank a Mike's hard beverage. 1VRP 49. Sometime after midnight, Suasey and Grantham returned from a Halloween party, bringing with them three of Grantham's friends, including Jacob Murphy. Grantham's friends were not known to the people who lived in the Napavine house. 1VRP 26, 39, 50, 91-92. Two of these friends were drunk and fell asleep on beds in the garage when the others went inside. 1VRP 26, 92. Murphy and Grantham had not drunk anything that night. 1VRP 92; 2VRP 70.

Grantham and Suasey went inside so Grantham could shower; Grantham had gotten covered in blood while breaking up a fight at the Halloween party. 1VRP 40 & 92. He came back downstairs after the shower and then they all decided to go upstairs to smoke. 1VRP 95. When Grantham went inside, Mr. Kalebaugh was still in the garage. 1VRP 99. At some point, however, Grantham saw Mr. Kalebaugh on the bed of blankets Schultz had made on the floor of the living room. 1VRP 99-100.

About ten minutes after Grantham went up for a shower, the others went upstairs to Suasey's room to smoke and take a look at Grantham's leg, which reportedly had been severely cut. 2VRP 22, 77. Before going upstairs, Schultz gave Mr. Kalebaugh a cigarette and saw him head toward the garage. 2VRP 23, 48. Aside from Grantham's two friends asleep in the garage, only Murphy, Mr. Kalebaugh and three children remained downstairs. 2VRP 23.

Nineteen-year old army private Jacob Murphy settled to sleep on a reclining couch in the living room, across from H.R.S. asleep on the love seat; two boys were also sleeping in the room. 2VRP 23, 72-73, 68, 96. As Murphy settled in, Mr. Kalebaugh was sitting on the bedding on the floor, watching TV. 2 VRP 76. Someone turned off the lights in the room and, as Murphy was falling asleep, someone turned the TV off. Murphy opened his eyes and saw Mr. Kalebaugh when he heard the click of the TV. 2VRP 73. The shades were open and the room was illuminated by the porch lights from outside, allowing Murphy to see fairly well. 2VRP 73-74.

Murphy closed his eyes to fall back asleep, but within minutes and before he fell asleep, he "heard rustling, like someone was moving a lot." 2VRP 74,76. He opened his eyes and saw Mr. Kalebaugh "chest up against the love seat with his hand underneath the blanket towards the girl's groin area." 2VRP 74. His hand

was "making a back and forth movement" under the blanket. 2VRP 74. Mr. Kalebaugh's hand was "right at her waistline." 2VRP 75. Murphy could not tell the exact location of Mr. Kalebaugh's hand, but was sure it was below the girl's waist. 2VRP 75. The touching seemed to be in the middle of the space between the girl's belly button and knees. 2VRP 109. The girl was lying on her back with one leg propped against the back of the couch and appeared to be sleeping. 2VRP 75, 77, 109. Ten to fifteen minutes had passed since the other adults went upstairs. 1VRP 33, 43; 2VRP 24, 77.

As soon as he saw this, Murphy confronted Mr. Kalebaugh, saying, "you know what you are doing is way wrong." 2VRP 77, 90. Mr. Kalebaugh removed his arm quickly and turned to face Murphy, seeming surprised, "like he went to a surprise party." 2VRP 78, 92-93. Murphy thought Mr. Kalebaugh then pretended to fall asleep: he rolled over, closed his eyes and faced the TV. 2VRP 77-78. Murphy went upstairs to tell the other adults, meeting Joyce on his way down. 2VRP 78. After describing the incident to Joyce, Murphy continued upstairs and told Schultz, H.R.S.'s mother. 2VRP 78-79; *but see* 1VRP 95-96 (Grantham testified Murphy called to him and Joyce from the stairway and told them both about the matter at the same time).

Joyce continued downstairs to talk to Mr. Kalebaugh. 1VRP 55. He found him standing in the garage, with the lights off and a cigarette in his hand. 1VRP 56. Joyce did not notice if the cigarette was lit. 1VRP 56; *but see* 1VRP 76 (on cross examination Joyce said he was certain Mr. Kalebaugh was not smoking the first time he talked to him). Joyce asked Mr. Kalebaugh if he touched the girl; Mr. Kalebaugh responded "no." 1VRP 56. Mr. Kalebaugh did not seem upset or angry, just surprised and confused. 1VRP 56 & 76-77. Joyce went back inside; H.R.S. was still on the couch and seemed to be sleeping, but the boys had been moved upstairs. 1VRP 57. He went upstairs and asked Murphy again what had happened. 1VRP 58.

Joyce then returned downstairs to talk to Mr. Kalebaugh a second time. He found him sitting on the freezer in the garage, smoking. 1VRP 76. Mr. Kalebaugh had the same demeanor as before, calm and surprised. 1VRP 58-59 & 76-77. He again denied touching the girl. No one came downstairs with Joyce to question Mr. Kalebaugh. 1VRP 58-59.

According to Murphy, however, after Joyce came upstairs and told him Mr. Kalebaugh had denied anything happened, he and Joyce returned downstairs, where Joyce confronted Mr. Kalebaugh in the living room. 2VRP 79. Murphy heard Joyce ask Mr. Kalebaugh if he was sure he did not do anything. Mr.

Kalebaugh paused, looked down and away, and denied doing anything. 2VRP 88. Murphy said, "You are lying." 2VRP 88. Mr. Kalebaugh did not respond verbally; he just looked shocked. 2VRP 88. After this confrontation, Mr. Kalebaugh lay down on the couch. 2VRP 108. By then, H.R.S. had been taken upstairs. 1VRP 29 & 32, 2VRP 26.

When Schultz learned about Murphy's allegations, she went to get H.R.S. 2VRP 26. H.R.S. was awake, lying on her back, and seemed groggy as though she had been sleeping. 2VRP 26-27; *but see* 1VRP 98 (Grantham said H.R.S. was facing the couch with her back towards the living room). H.R.S.'s sleeping shorts were pushed up toward her hip on the side closest to the outside of the couch and were wrinkled where they were pushed up. 2VRP 27-28. The shorts were up to her waistline, to the point where her underwear was visible. 2VRP 28. Schultz had not seen her shorts pulled up to that extent before. 2VRP 28.

Mr. Kalebaugh had been living at Strong's house about six months at the time of the incident. 2VRP 123. He testified that he and Joyce went out to the garage around 8:30 that night to drink while the children were still up. 2VRP 126-27. Strong and Shultz came out to the garage around 10:30 to 11 and drank with the others. 2VRP 127-28. The children, ranging in age from four weeks to five

years, were left in the house alone. 2VRP 128. Grantham, Suasey, the two drunk friends and Murphy arrived around 1:30 to 1:45. 2VRP 128.

When Mr. Kalebaugh went inside to the restroom, he got a cigarette from Schultz. 2VRP 130. Mr. Kalebaugh remembered that Murphy and one of Schulz's sons were sleeping on either side of the reclining couch and another boy was on the reclining chair. Mr. Kalebaugh planned to sleep on the large couch. 2VRP 130-31; *but see* 2VRP 152, 156 (Schultz and Murphy did not believe either boy slept on the reclining couch near Murphy). Before going to sleep, he went out to the garage to smoke the cigarette Schultz had given him. 2VRP 132-33. The next time he spoke to anyone was when Joyce came outside and talked to him about Murphy's accusation. Joyce came out a second time to discuss the matter. 2VRP 133. Mr. Kalebaugh had had no contact with H.R.S. About eight to ten minutes elapsed after everyone went upstairs before he was contacted by Joyce. He knew this because his cigarette was not yet finished when Joyce came outside. 2VRP 135.

After the talk, Mr. Kalebaugh went inside and lay down on the couch. Murphy told him to go outside. Mr. Kalebaugh thought Murphy wanted to fight him, so he refused. 2VRP 134; *but see* 2VRP 145 (Murphy testified he told Mr. Kalebaugh the cops were there and he had to go outside).

The police officer who responded to the 911 call that night went inside and found Mr. Kalebaugh lying awake on the couch. The officer brought him outside and secured him in his patrol car. 2VRP 54-55. When he spoke with Mr. Kalebaugh, Mr. Kalebaugh said he did not touch anybody and had been smoking a cigarette and sleeping on the couch. 2VRP 55-56. He was "pretty calm," "very compliant, and "his response to everything was I didn't touch anybody." 2VRP 56, 60. He said Schultz had given him a cigarette, which he smoked in garage, before returning to the living room, where he fell asleep on the couch. 2VRP 56. He denied sleeping on the floor. 2VRP 56-57. Mr. Kalebaugh emitted a strong smell of alcohol. 2VRP 58.

The nurse practitioner who performed a physical examination of H.R.S. determined she was a healthy, normal young girl. She was not surprised there were no findings; it is normal in sexual assault cases to have no physical findings. 1VRP 83.

2. Jury Instructions and Argument

In its preliminary instructions to the jury, the trial court gave the following instruction on reasonable doubt:

> A "reasonable doubt" is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person, after fully, fairly and carefully considering all the evidence or lack of evidence. If

> after such consideration you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt. *If after your deliberations you do not have a doubt for which a reason can be given as to the defendant's guilt, then, you are satisfied beyond a reasonable doubt.*
>
> *On the other hand, if after your deliberations you do have a doubt for which a reason can be given as to the defendant's guilt, then, you are not satisfied beyond a reasonable doubt.*

1VRP 9 (emphasis added). The portion of the instruction printed in italics above was added to the pattern advance oral jury instruction. *See* 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 1.01 (3d ed. 2008) (WPIC). Mr. Kalebaugh did not object to this instruction. The pattern reasonable doubt jury instruction was given at the conclusion of the evidence portion of the trial. 2VRP 167-68 (Jury Instruction No. 2); *see* WPIC 4.01.

Over Mr. Kalebaugh's objection, 2VRP 159-51, the trial court gave the following jury instruction defining sexual contact:

> "Sexual contact" means any touching of a sexual or other intimate part of a person done for the purpose of gratifying sexual desires of either party.
>
> *Contact is intimate, if the contact is of such a nature that a person of common intelligence could fairly be expected to know that under the circumstances the parts touched were intimate and therefore the touching was improper. When considering whether a particular touching is done for the purpose of gratifying a sexual desire, you may consider among other things the nature and circumstances of the touching itself. Sexual contact may occur through a person's clothing.*

2VRP 169 (emphasis added). The portion of the instruction printed in italics above was added to the pattern jury instruction defining sexual contact. *See* WPIC 45.07.[1]

During its closing argument, the State argued, "Now you as a jury get to decide what counts as an intimate part of the person's body." 3VRP 11. Mr. Kalebaugh objected to this statement and the court overruled the objection. *Id.*

The State had the following to say about sexual contact:

> So just because it's not right in the vagina doesn't mean that it's not necessarily sexual contact.
>
> Think about it. The whole reason the region is kind of intimate, especially if you don't know this person, let alone that they are five and you are 32, but even though the touching was above the knees and below the belly button, and when asked Private Murphy said it was towards the middle of that zone, that's right over the vagina, and even if it was closer to the knees or closer to the belly button, rubbing on her, that's an intimate area. Anywhere in that zone is intimate. You wouldn't feel comfortable with a stranger touching you anywhere near, probably nowhere on your body, but especially nowhere between that zone. That's an intimate part of your body.

3VRP 11-12. The court overruled Mr. Kalebaugh's objection to this argument. 3VRP 12.

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1. When the court read the instructions to the jury, it apparently stated, "Contact is intimate, if the *contact* . . ." 2VRP 169 (emphasis added). However, the written instructions, three copies of which were provided to the jury, 2VRP 163-64, read, "Contact is intimate, if the *conduct* . . ." CP 25 (emphasis added).

IV. ARGUMENT

POINT I: The Trial Court's Preliminary Instruction on Reasonable Doubt Was Reversible Error Because its Emphasis on "a Doubt for Which a Reason can be Given as to the Defendant's Guilt" Shifted the Burden of Proof and Undermined the Presumption of Innocence

A. The Instruction was Manifest Constitutional Error

The trial court violated Mr. Kalebaugh's due process rights and committed manifest constitutional error when it added to the standard preliminary jury instruction on reasonable doubt the following sentences:

> If after your deliberations you do not have a doubt for which a reason can be given as to the defendant's guilt, then, you are satisfied beyond a reasonable doubt.
>
> On the other hand, if after your deliberations you do have a doubt for which a reason can be given as to the defendant's guilt, then, you are not satisfied beyond a reasonable doubt.

1VRP 9. The court's incorrect emphasis on "a doubt for which a reason can be given as to the defendant's guilt," improperly implied the jury had to convict unless it could articulate a reason to acquit, shifting the burden of proof and undermining the presumption of innocence.

Jury instructions "must define reasonable doubt and clearly communicate that the State carries the burden of proof." State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). "A challenged jury instruction is reviewed de novo, in the context of the instructions as a whole." *Id.* Although Mr. Kalebaugh did not object

to the jury instruction in this case, an incorrect instruction as to reasonable doubt is manifest constitutional error that may be heard for the first time on appeal. *See* RAP 2.5(a); State v. Lundy, 162 Wn. App. 865, 870, 256 P.3d 466 (2011) (noting no trial objection and deciding issue of reasonable doubt instruction that did not conform to pattern jury instruction); *see also* State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (noting, "RAP 1.2(a) mitigates the stringency of [RAP 2.5(a)], providing that the RAPs are to "be liberally interpreted to promote justice and facilitate the decision of cases on the merits").

First, the instruction was error. The trial court's emphasis on "a doubt for which a reason can be given as to the defendant's guilt," required an articulable reason before the jury could acquit, impermissibly shifting the burden of proof to Mr. Kalebaugh. In fact, the instruction was similar to improper prosecutorial argument telling the jury it must have an articulable reason to acquit. For example, a fill-in-the-blank argument was deemed improper by this Court in 2009 because it implied the jury had to convict unless it could come up with a reason not to. State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009).

In Anderson, the prosecutor had argued, "in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because,' and then

you have to fill in the blank." *Id.* This Court condemned the burden shifting inherent in the implication that an articulable reason is necessary to acquit:

> The jury need not engage in any such thought process. By implying that the jury had to find a reason in order to find Anderson not guilty, the prosecutor made it seem as though the jury had to find Anderson guilty unless it could come up with a reason not to. Because we begin with a presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper. Furthermore, this argument implied that Anderson was responsible for supplying such a reason to the jury in order to avoid conviction.

153 Wn. App. 417, 431. This court confirmed the impropriety of such argument in State v. Venegas, 155 Wn. App. 507, 524, 228 P.3d 813 (2010); State v. Johnson, 158 Wn. App. 677, 684-85, 243 P.3d 936 (2010); and State v. Emery, 161 Wn. App. 172, 194-95, 253 P.3d 413 (2011).

While the Supreme Court recently held such argument is not reversible error when a curative instruction would have ameliorated its impact, State v. Emery, ___ P.3d ___, 2012 WL 2146783, *9-10, ¶¶34-40, No. 86033–5, (June 14, 2012), it agreed such argument is improper. Similar to this Court's conclusion, the Supreme Court found argument requiring an articulable reason to acquit was burden shifting:

> And although the argument properly describes reasonable doubt as a "doubt for which a reason exists," it improperly implies that the jury must be able to articulate its reasonable doubt by filling in the blank. This suggestion is inappropriate because the State bears the

> burden of proving its case beyond a reasonable doubt, and the defendant bears no burden. State v. Camara, 113 Wn.2d 631, 638, 781 P.2d 483 (1989) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). By suggesting otherwise, the State's fill-in-the-blank argument subtly shifts the burden to the defense.

Emery, 2012 WL 2146783, *8, ¶31.

The trial court's instruction in this case had a similar burden-shifting effect. Like improper fill-in-the-blank argument, the court's instruction told the jury it could acquit only if it could name a reason for acquitting: "If after your deliberations you do not have *a doubt for which a reason can be given as to the defendant's guilt*, then, you are satisfied beyond a reasonable doubt. On the other hand, if after your deliberations *you do have a doubt for which a reason can be given as to the defendant's guilt*, then, you are not satisfied beyond a reasonable doubt." 1VRP 9 (emphasis added).

Indeed, the court's jury instruction, while perhaps less blatant than arguments deemed improper in prior cases, is analytically identical to burden-shifting fill-in-the-blank arguments. Although, like the argument at issue in Emery, the instruction correctly noted reasonable doubt is "one for which a reason exists," its repetition of the phrase "a doubt for which a reason can be given as to the defendant's guilt," shifted the burden to the defendant to supply the reason. Like the argument held improper in Anderson, the jury instruction in this case

"made it seem as though the jury had to find [Mr. Kalebaugh] guilty unless it could come up with a reason not to." Anderson, 153 Wn. App. 417, 431. Thus, under this Court's and the Supreme Court's jurisprudence, the trial court's preliminary reasonable doubt jury instruction was improper.

Next, the error was of constitutional magnitude because an improper reasonable doubt instruction violates the due process clause. "[I]nstructional errors which tend to shift the burden of proof to a criminal defendant are of a constitutional magnitude because they may implicate a defendant's rights of due process." State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); U.S. Const. amend. XIV; Wash. Const. Art. I, Sec. 3; *see also* State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977) (holding failure to define reasonable doubt and to instruct jurors that the prosecution must prove each element by this standard is a "grievous constitutional failure").

Further, the error was manifest. A constitutional error is manifest if the appellant can show "practical and identifiable consequences in the trial of the case" or the error was "so obvious on the record that the error warrants appellate review." State v. Gordon, 172 Wn.2d 671, 676, 676 n.2, 260 P.3d 884 (2011). In this case, the error was obvious under this Court's case law, which, well prior to the 2012 trial in this case, had consistently held prosecutorial argument requiring

an articulable reason to acquit improper. Moreover, the error had practical and identifiable consequences in the trial because it undermined the presumption of innocence as it allowed reasonable doubt to be perceived as Mr. Kalebaugh's burden.

For all these reasons, the error was manifest and constitutional and should be heard by this Court.

B. The Erroneous Reasonable Doubt Instruction Created Structural Error Because it Shifted the Burden of Proving Doubt to Mr. Kalebaugh, Undermining the Presumption of Innocence

The instructional error in this case was of such a grave nature as to be structural. Instructing the jury it could acquit only if it had "a doubt for which a reason can be given as to the defendant's guilt" and that it must convict if it did not have "a doubt for which a reason can be given as to the defendant's guilt" shifted the burden of proof and undermined the presumption of innocence, a bedrock principle:

> The presumption of innocence is the bedrock upon which the criminal justice system stands. The reasonable doubt instruction defines the presumption of innocence. The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve. This court, as guardians of all constitutional protections, is vigilant to protect the presumption of innocence.

Bennet, 161 Wn.2d 303, 315-16. Under these circumstances, use of the instruction amounted to structural error requiring automatic reversal.

Structural errors are "error so intrinsically harmful as to require automatic reversal . . . without regard to their effect on the outcome" of the trial. Neder v. United States, 527 U.S. 1, 7, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). "An error is structural when it 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" State v. Momah, 167 Wn.2d 140, 149, 217 P.3d 321 (2009), *quoting* Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Structural errors occur only in a very limited class of cases. Neder, 527 U.S. at 8. Nevertheless, a reasonable doubt jury instruction that could have been interpreted to lower the State's burden of proof has been held to be structural error. Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

The preliminary reasonable doubt jury instruction in this case was structural error because it told the jury it needed an articulable reason before it could acquit and, thus, shifted the burden of proof and undermined the presumption of innocence. Accordingly, this Court should reverse Mr. Kalebaugh's conviction.

C. If Not Structural, the Error Was Nevertheless Not Harmless Beyond a Reasonable Doubt

If the Court holds the error was not structural, Mr. Kalebaugh's conviction should be reversed because the error was not harmless beyond a reasonable doubt. "Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Under this standard, vacation of the conviction is required "unless it necessarily appears, beyond a reasonable doubt," that the error "did not affect the verdict." State v. Monday, 171 Wn.2d 667, 680, 297 P.3d 551 (2011). An error is harmless beyond a reasonable doubt if the evidence is so overwhelming that it necessarily leads to a finding of guilt. Guloy, 104 Wn.2d 412, 425. In this case, the nature of the error prevents the State from meeting its burden of establishing harmlessness beyond a reasonable doubt and the evidence was not so overwhelming as to overcome the presumption of prejudice.

First, the error in this case was so fundamental it cannot be shown harmless beyond a reasonable doubt. "It is reversible error to instruct the jury in a manner that would relieve the State of" its burden of proving guilt beyond a reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995); Bennett, 161 Wn.2d 303, 307 (same); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000) ("a conviction cannot stand if the jury was instructed in a manner

that would relieve the State of [its] burden"). As explained above, the addition of the challenged two sentences here relieved the State of its burden of proof. Following the court's instruction, a reasonable juror could have convicted Mr. Kalebaugh because it could not articulate "a doubt for which a reason can be given as to the defendant's guilt." Under these circumstances, the instruction cannot be shown harmless beyond a reasonable doubt because it could have affected the outcome of the case. *See* McCullum, 98 Wn.2d 484, 498 (holding misleading jury instruction could not be deemed harmless beyond a reasonable doubt when it could have affected the final outcome of the case).

In this regard, the proper reasonable doubt instruction given at the conclusion of the evidence in this case did not cure the trial court's error. Notably, even in the Supreme Court's decision in Emery, a prosecutorial misconduct case, the proper reasonable doubt jury instruction was not deemed to have cured the prosecutor's improper argument. Only a curative instruction could have done that. Emery, 2012 WL 2146783, *9-10, ¶¶34-40. Clearly, a curative instruction was not available in this case when it was the court that improperly instructed the jury.

In addition, the error was not harmless beyond a reasonable doubt because the evidence was not so overwhelming as to necessarily lead to a finding of guilt. The central question in the case, whether Mr. Kalebaugh had sexual contact with

H.R.S., was a subject of considerable dispute. As argued below, the State failed to prove both the touching of an intimate or sexual body part and touching with the purpose of sexual gratification when it established, at most, that Mr. Kalebaugh briefly touched H.R.S. somewhere between her knees and belly button *See* Point II, below. Under these circumstances, the erroneous reasonable doubt jury instruction was not harmless beyond a reasonable doubt and this Court should reverse Mr. Kalebaugh's conviction.

Point II: The State Failed to Prove the Charged Crime When it Failed to Establish Mr. Kalebaugh had Sexual Contact with the Victim

The evidence at trial was insufficient as a matter of law to prove Mr. Kalebaugh had sexual contact with H.R.S. A challenge to the sufficiency of the evidence requires the Court to view the evidence in the light most favorable to the State. The relevant question is whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In claiming insufficient evidence, the defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it: "All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Hosier, 157 Wn.2d at 8; Salinas, 119 Wn.2d at 201.

In this case, the trial evidence failed to establish Mr. Kalebaugh had sexual contact with the victim. To convict Mr. Kalebaugh of Child Molestation in the First Degree, the State had to prove beyond a reasonable doubt the following elements: 1) Mr. Kalebaugh had sexual contact with H.R.S., 2) H.R.S. was less than 12 years old at the time of the contact and not married to Mr. Kalebaugh, 3) H.R.S. was at least 36 months younger than Mr. Kalebaugh and 4) the act occurred in Washington. 2VRP 170 (Jury Instruction No. 6); RCW 9A.44.083. The only issue in dispute was whether Mr. Kalebaugh had sexual contact with H.R.S.

Two requirements are necessary to support a finding of sexual contact: 1) the "touching of the sexual or other intimate parts of a person" that is 2) "done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). The State failed to prove sexual contact in this case when it failed to prove either requirement.

In determining whether the sexual contact element has been satisfied, a court looks to the totality of the facts and circumstances presented. State v. Harstad, 153 Wn. App. 10, 21, 218 P.3d 624 (2009). Here, the total evidence of both the touching of an intimate or sexual body part and the purpose of sexual gratification consisted of Murphy's account of briefly seeing movement under a

blanket somewhere in the region from the girl's knees to her belly button and the child's disarrayed shorts. This evidence failed to prove the charged crime and this Court should reverse Mr. Kalebaugh's conviction.

First, the conviction must be reversed because the State failed to establish the body part Mr. Kalebaugh allegedly touched, thus failing to prove the touching of either a sexual or intimate part as required by statute. The sole witness to the alleged event, Murphy, only saw movement under a blanket. He saw a "back and forth movement" "towards the girl's groin area." 2VRP 74. Alternatively, he testified that Mr. Kalebaugh's hand was "right at her waistline." 2VRP 75. In fact, Murphy could not be sure of the exact location of Mr. Kalebaugh's hand, but he knew it was below the waist, 2VRP 75, and seemed to be in the middle of the space between the girl's belly button and knees. 2VRP 109. This testimony only established a general area where Mr. Kalebaugh allegedly touched H.R.S. and did not prove the touching of either a sexual or intimate body part.

That the girl's sleeping shorts were pulled up toward her waist on one side did not clarify the place allegedly touched. Clearly, the situation would be different if the shorts were removed or the closure was opened, but pulled-up shorts are far from proof of molestation. To the extent the condition of the shorts

was unusual, it was explained by the fact that the girl was not sleeping at home in her bed, but on someone's couch.

Given its failure to establish where, if anywhere, Mr. Kalebaugh touched H.R.S., the State argued the entire area from the girl's knees to her belly button was an intimate part of H.R.S.'s body:

> even if [the touching] was closer to the knees or closer to the belly button, rubbing on her, that's an intimate area. Anywhere in that zone is intimate. You wouldn't feel comfortable with a stranger touching you anywhere near, probably nowhere on your body, but especially nowhere between that zone. That's an intimate part of your body.

3VRP 12. Case law, however, does not support this argument.[2]

An "intimate area" of the body "is somewhat broader in connotation than the term 'sexual.'" In re Welfare of Adams, 24 Wn. App. 517, 519, 601 P.2d 995 (1979). "Which anatomical areas, apart from genitalia and breast, are 'intimate' is a question for the trier of fact." State v. Jackson, 145 Wn. App. 814, 819, 187 P.3d 321 (2008). "Contact is 'intimate' within the meaning of the statute if the conduct is of such a nature that a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper." Harstad, 153 Wn. App. 10, 21, *quoting*,

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2. Mr. Kalebaugh argues this objected-to argument was improper and prejudicial, see Point IV, below.

Jackson, 145 Wn. App. at 819. However, the determination of which parts of the body are intimate is not without limits. A jury may determine a body part is intimate if it is "in close proximity to the primary erogenous areas." Harstad, 153 Wn. App. 10, 21, *quoting*, Adams, 24 Wn. App. 517, 521.

In the instant case, the State failed to prove the touching of an intimate or sexual body part when its evidence only established touching somewhere within the area between the girl's knees and belly button. For the State to prevail, this Court would have to find that *any* place in the knee to waist region is an intimate body part: anyplace on the knees, the waist or abdomen through the clothes, the outside or front of the thighs. No prior case has gone this far.

For these reasons, the State failed to prove the touching of a sexual or intimate body part when it failed to prove where, from the knees to the waist, Mr. Kalebaugh allegedly touched H.R.S.

In any event, the State clearly did not prove the touching of genitalia or breasts. Cases which have found nonsexual body parts to be "intimate" body parts have relied on evidence that the "touching is incidental to other activities which are intended to promote sexual gratification of the actor." Adams, 24 Wn. App. 517, 520 (holding hips an intimate body part when they were touched to obtain more intimate contact); *accord*, Harstad, 153 Wn. App. 10, 22 (relying on Adams

to hold inner thighs intimate body part when the touching "was incidental to another activity intended to promote sexual gratification").

Thus, in both Adams and Harstad, it was not just the touching, but the touching combined with an ulterior sexual motive that made the body part "intimate." In this case, by contrast, there was no evidence of any ulterior sexual motive on Mr. Kalebaugh's part, no indication the touching was "incidental to other activities," no evidence anything occurred other than the touching itself. Thus, for this reason also the State failed to prove Mr. Kalebaugh touched an intimate body part.

Next, the State failed to prove Mr. Kalebaugh touched H.R.S. for the purpose of sexual gratification when it provided no evidence of such gratification other than the alleged touching. While the touching of an intimate part of a child by an unrelated adult supports the inference the touch was for the purpose of sexual gratification, State v. Powell, 62 Wn. App. 918, 917, 816 P.2d 86 (1991), without evidence of direct sexual contact, some additional evidence of sexual gratification is required:

> [I]n those cases in which the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification.

Id.; Harstad, 153 Wn. App. 10, 21; *see* State v. Price, 127 Wn. App. 193, 110 P.3d 1171 (2005) (quoting Powell but finding evidence defendant had rubbed child's vagina until it was red provided evidence of sexual gratification).

In this case, there was nothing other than the touch itself, done at night by a person who was neither a relative nor a caretaker, to indicate the purpose of sexual gratification. Murphy did not report any signs of arousal in Mr. Kalebaugh. There was no indication any alleged touching was "incidental to another activity intended to promote sexual gratification." While the touching occurred at night, it happened in a fairly well-lit room, where two other children and another adult were sleeping, just minutes after Murphy had settled in for the night – notably not in great secrecy. 2VRP 74, 76. Further, the touching could only have lasted seconds because Murphy stated he confronted Mr. Kalebaugh as soon as he saw the movement under the blanket. 2VRP 90; *cf.* Powell, 62 Wn. App. 918, 917 (contact deemed not sexual contact was fleeting).

Moreover, Mr. Kalebaugh never did or said anything indicative of guilt. *See* State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2002) (evidence defendant told child not to tell indicative of guilt). Mr. Kalebaugh looked exceedingly surprised when Murphy confronted him and told him what he was doing was wrong. 2VRP 78, 92-93. When asked if he touched the girl, Mr. Kalebaugh

repeatedly responded "no." 1VRP 56, 58. He appeared confused and surprised. 1VRP 56 & 76-77. When Murphy suggested he was lying, Mr. Kalebaugh looked shocked. 2VRP 88. Under these circumstances, the State failed to prove "additional evidence of sexual gratification" and thus failed to prove the alleged touching was for the purpose of sexual gratification.

In sum, the State failed to prove the touching of an intimate or sexual body part when it failed to establish the place on H.R.S. Mr. Kalebaugh allegedly touched. Even if the State's nonspecific evidence as to the place touched was sufficient, without evidence that the contact was "incidental to another activity intended to promote sexual gratification," the State failed to prove the touching was of an "intimate" body part. Even if it proved the touching of an intimate body part, it failed to prove the touching was for the purpose of sexual gratification. For all these reasons, this Court should reverse Mr. Kalebaugh's conviction.

Point III: The Trial Court Erred in Giving an Objected-to Jury Instruction That Was Contrary to Law and Prejudicial to Mr. Kalebaugh

The court's jury instruction defining "sexual contact" was erroneous and misleading when it allowed the jury to determine that *any* body part could be an intimate body part and informed the jury the determination was based on the part touched, not on the purpose for the touching, in contradiction to the rule of both

Adams and Harstad. Courts of appeal review jury instructions de novo, in the context of the jury instructions as a whole. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995); State v. Rivas, ___ Wn. App. ___, 278 P.3d 686, ¶ 21, No. 41416–3–II (June 19, 2012). Jury instructions are flawed if they, as a whole, fail to properly inform the jury of applicable law, are misleading, or prevent the defendant from arguing his theory of the case. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). Reversal is required when the erroneous instruction prejudiced the complaining party. State v. Aguirre, 168 Wn.2d 350, 364, 229 P.3d 669 (2010). In this case, the jury instruction was a misstatement of the law, misleading and prejudicial, requiring reversal.

Here, over Mr. Kalebaugh's objection, the trial court gave the State's proposed jury instruction defining "sexual contact" that contained language not included in the pattern instruction. The instruction added, *inter alia*, the sentence, "Contact is intimate, if the contact is of such a nature that a person of common intelligence could fairly be expected to know that under the circumstances the parts touched were intimate and therefore the touching was improper." 2VRP 169 (Jury Instruction No. 4).[3] While a variation of this sentence appears in caselaw, as a rule offered out of context, it is a misleading, incorrect statement of the law.

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3. Mr. Kalebaugh does not object on appeal to the other two sentences added to the pattern jury instruction. *See* 2VRP 169.

As an initial matter, the court's instruction was a plain misstatement of the law because it substituted "contact" for the key word "conduct" from the case rule. The rule from prior cases states: "Contact is intimate, if the *conduct* is of such a nature that a person of common intelligence could fairly be expected to know that under the circumstances the parts touched." Harstad, 153 Wn. App. 10, 21, *quoting*, Jackson, 145 Wn. App. 814, 819. Thus, unlike the jury instruction used in this case, the rule requires the jury to look at the defendant's conduct to determine whether the place touched is intimate, not just the contact.

Further, and as Mr. Kalebaugh explained in Point II, above, in determining whether a jury has correctly determined a body part to be "intimate," appellate courts consider the part touched in connection with the reason it was touched. In these situations, courts look to the purpose of the contact to determine whether it is "intimate," finding it so "particularly if that touching is incidental to other activities which are intended to promote sexual gratification of the actor." Adams, 24 Wn. App. 517, 520; *accord*, Harstad, 153 Wn. App. 10, 22. Thus, the determination of whether a nonsexual body part is "intimate" is inextricably intertwined with the determination of whether the touching was done for the purpose of sexual gratification. The objected-to sentence misled the jury regarding this aspect of the law.

Moreover, regardless of whether the word "contact" or "conduct" is used in the sentence, the sentence was misleading because it allowed the jury to believe any part of the body might be deemed intimate, when the law holds that only "parts of the body in close proximity to the primary erogenous areas" may be found to be intimate parts. Harstad, 153 Wn. App. 10, 21, *quoting*, Adams, 24 Wn. App. 517, 521. In discussing the indecent liberties statute in Adams, the court held: "The statute is directed to protecting the parts of the body in close proximity to the primary erogenous areas which a reasonable person could deem private with respect to salacious touching by another." Adams, 24 Wn. App. at 521. Thus, the objected-to sentence impermissibly broadened the scope of body parts a jury can deem to be intimate.

For these reasons, instructing the jury that the focus of the decision of whether contact is intimate is whether "the contact [or conduct] is of such a nature that a person of common intelligence could fairly be expected to know that under the circumstances the parts touched were intimate and there for the touching was improper," provided an overly-simplistic statement of law that was misleading because it focused on the body part touched. Using this sentence in the instruction, without consideration of whether the touching of the part was "incidental to other activities which are intended to promote sexual gratification

of the actor," or of an area of the body "in close proximity to the primary erogenous areas" was an incorrect statement of law.

This incorrect instruction prejudiced Mr. Kalebaugh because it allowed the jury to convict him under an incorrect understanding of intimate body part, one that was less rigorous than required by law. The instruction was particularly prejudicial because it dovetailed with the prosecutor's improper argument that anywhere between the knees and the waist is an intimate body part. Indeed, the prosecutor's improper argument was supported by this instruction.[4]

After giving the jury carte blanche "to decide what counts as an intimate part of the person's body," 3VRP 11, without any reference to the primary erogenous zones, the State instructed the jury to determine the contact was intimate solely because it was between the knees and the belly button:

> even if it was closer to the knees or closer to the belly button, rubbing on her, that's an intimate area. Anywhere in that zone is intimate. You wouldn't feel comfortable with a stranger touching you anywhere near, probably nowhere on your body, but especially nowhere between that zone. That's an intimate part of your body.

3VRP 12. As explained, under case law, the whole area between belly button and knees cannot be deemed "intimate" and even areas in close proximity to the primary erogenous zones are intimate only with indication of further sexual intent.

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4. Mr. Kalebaugh appeals the State's improper argument in Point IV.

Given the lack of evidence as to where on H.R.S.'s body the alleged touching occurred, the erroneous jury instruction, which supported the State's incorrect statement of law during closing, likely resulted in Mr. Kalebaugh's conviction. For all of these reasons, this Court should reverse his conviction.

Point IV: Improper Prosecutorial Comment Deprived Mr. Kalebaugh of His Right to a Fair Trial

Mr. Kalebaugh was deprived of his right to a fair trial by the prosecutor's misstatement of the law in this case. Defendants are guaranteed the right to a fair and impartial trial by the Sixth and Fourteenth Amendments of the United States Constitution, and by article I, section 3 and article I, section 22 (amendment 10) of the Washington Constitution. In re Crace, 157 Wn. App. 81, 96, 236 P.3d 914 (2010). "Prosecutorial misconduct may deprive a defendant of his right to a fair trial." State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011); *citing*, State v. Jones, 144 Wn. App. 284, 290, 183 P.3d 307 (2008).

A prosecuting attorney, a quasijudicial officer, must act with impartiality in the interest of justice and "subdue courtroom zeal for the sake of fairness to the defendant." State v. Thorgerson, 172 Wn.2d 438, 448, 258 P.3d 43 (2011) (citations omitted). While "the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence" in closing arguments, Thorgerson, 172 Wn.2d 438, 443, the prosecutor also owes the defendant a duty to ensure the right

to a fair trial is not violated. State v. Ramos, 164 Wn. App. 327, 333, 263 P.3d 1268 (2011), *citing*, State v. Monday, 171 Wn.2d 667, 676, 297 P.3d 551 (2011).

To prevail on appeal, Mr. Kalebaugh must show "that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." Thorgerson, 172 Wn.2d 438, 442 (citations omitted). "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." State v. Russell, 125 W.2d 24, 86, 882 P.2d 747 (1994).

Conduct is prejudicial if the Court finds "a substantial likelihood the misconduct affected the jury's verdict." State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). This Court reviews prosecutors' comments "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions." Evans, 163 Wn. App. 635, 642, *citing*, State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). When the trial court overruled a defense objection, the trial court's ruling is reviewed for abuse of discretion. State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010) (citations omitted).

In this case, the prosecutor misstated the law of sexual contact twice. The first misstatement occurred when he averred, "Now you as a jury get to decide what counts as an intimate part of the person's body." 3VRP 11. The second misstatement happened when he told the jury that any where between the belly button and the knees is an intimate body part:

> Think about it. The whole reason the region is kind of intimate, especially if you don't know this person, let alone that they are five and you are 32, but even though the touching was above the knees and below the belly button, and when asked Private Murphy said it was towards the middle of that zone, that's right over the vagina, and even if it was closer to the knees or closer to the belly button, rubbing on her, that's an intimate area. Anywhere in that zone is intimate. You wouldn't feel comfortable with a stranger touching you anywhere near, probably nowhere on your body, but especially nowhere between that zone. That's an intimate part of your body.

3VRP 11-12.

First, as previously discussed, while the fact finder determines whether an intimate part of the body has been touched, the prosecutor misstated the law when it suggested the jury could decide, without limitation, what constituted an intimate part. According to the prosecutor's formulation of the law, the jury could decide that any body part, including the forehead, elbow or, indeed, knee, was intimate. This advice was contrary to law which only allows the jury to "determine that parts of the body in close proximity to the primary erogenous areas" are intimate parts. Harstad, 153 Wn. App. 10, 21, *quoting*, Adams, 24 Wn. App. 517, 521.

Accordingly, telling the jury it "get[s] to decide what counts as an intimate part of the person's body" was error.

Next, the State also misstated the law when it told the jury the whole region from the knees through the belly button consists of intimate body parts. As previously explained, the whole area between belly button and knees cannot be deemed "intimate" and even areas in close proximity to the primary erogenous zones are intimate only with indication of further sexual intent. *See* Points II & III, above.

Although Mr. Kalebaugh objected to these arguments, 3VRP 11 & 11-12, the court overruled the objections, allowing the jury to infer the State provided a correct statement of the law. *See* State v. Gonzales, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002) (holding effect of improper argument compounded and given additional credence when trial court overruled defendant's objection and stated, "that objection is not well taken"). Indeed, a prosecutor's explication of the law carries particular weight because "[t]he jury knows that the prosecutor is an officer of the State." State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008).

This erroneous statement of law prejudiced Mr. Kalebaugh given the lack of evidence that he actually touched an intimate part of the victim with the purpose of sexual gratification. *See* Point II, above. The State's misstatement

enabled it to obtain a conviction with proof Mr. Kalebaugh touched any place from the knees to the belly button, regardless of its relation to the primary erogenous zones or the purpose of the touching. Further, the error was compounded by the erroneous jury instruction on sexual contact, which allowed the jury to find Mr. Kalebaugh had touched an intimate body part based on the point of contact, rather than his conduct and intent. *See* Point III, above.

The prejudice was particularly evident in this case where the question of what happened in the living room rested on a credibility contest between Murphy and Mr. Kalebaugh. In cases where a conviction is reversed for prosecutorial error, the evidence has generally been a "credibility contest." *See* State v. Walker, 164 Wn. App. 724, 737-38, 265 P.3d 191 (2011), *discussing*, State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010); State v. Venegas, 155 Wn. App. 507, 228 P.3d 813 (2010). Walker reversed the defendant's conviction due to several unobjected-to prosecutorial errors when the evidence against the defendant "was largely a credibility contest in which the prosecutor's improper arguments could easily serve as the deciding factor." Walker, 164 Wn. App. at 738.

Here, similarly, the evidence was a credibility contest with the main issue—whether Mr. Kalebaugh had sexual contact with the victim—in dispute. Under these circumstances, and as was held in Walker, Johnson and Venegas, the

prosecutor's erroneous statements of law could easily have been the deciding factors, denying Mr. Kalebaugh his right to a fair trial and requiring reversal. Accordingly, this Court should reverse Mr. Kalebaugh's conviction.

Point V: Taken Together, the Trial Errors Deprived Mr. Kalebaugh of His Right to a Fair Trial

Even if none of these errors is sufficient individually to require reversal, taken together, the errors denied Mr. Kalebaugh a fair trial. Recently, this Court had the opportunity to revisit its position on cumulative error, stating, "we have never hesitated to reverse where several errors combined to deny the defendant a fair trial." State v. Evans, 163 Wn. App. 635, 647, 260 P.3d 934 (2011) (citations omitted).

In this case, the court's jury instruction which shifted the burden of proof and undermined the presumption of innocence, its incorrect instruction on sexual contact, and the State's misleading and prejudicial statements regarding intimate body parts combined to deny Mr. Kalebaugh a fair trial. These errors were similar to the prosecutorial errors in Evans, where the Court reversed due to unobjected-to prosecutorial comments which improperly attacked the presumption of innocence, the State's burden of proof, and the jury's role. *Id.* at 648. In this case too, the burden of proof and presumption of innocence were undermined and, most significantly, by the court, not the prosecutor. These errors, combined with

the other instructional error and the State's incorrect statement of the law, require reversal.

V. CONCLUSION

For all of these reasons, Chadwick Leonard Kalebaugh respectfully requests this Court to reverse his conviction.

Dated this 23rd day of July 2012.

Respectfully submitted,

/s/ *Carol Elewski*
Carol Elewski, WSBA # 33647
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 23rd day of July, 2012, I caused a true and correct copy of Appellant's Brief to be served, by e-filing, on:

Respondent's Attorney

Ms. Sara Beigh
Attorney at Law
Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov

and, by U.S. Mail, on:

Mr. Chadwick Kalebaugh
DOC No. 318220, H2 108
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98529.

/s/ *Carol Elewski*
Carol Elewski

ELEWSKI, CAROL ESQ

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